fense, and was admissible at law under the reformed code of procedure.[17] The jurisdiction of equity to restrain a party from enforcing a judgment is undoubted.[18] Although the California judgment created a new right, it was based upon a presupposition that has failed, so that it would be unconscionable to enforce the right. Relief by direct proceeding in California is clearly inadequate under the circumstances. Moreover, the defense is not open to the practical objection that it involves a reopening of the California judgment on the merits. Hence the New York court might well exercise its equitable power to modify the legal situation as is commonly done in the case of mortgages. The precise manner of accomplishing the result, being a matter of procedure, is governed by the law of the forum. Thus fraud, although no legal defense to a judgment,[19] may be a reason for restraining its enforcement, and in jurisdictions allowing equitable defenses at law, may be set up in an action upon the judgment.[20]

THE EFFECT OF CHANGING THE USE OF LAND TAKEN BY EMINENT DOMAIN. — Statutes conferring the power of eminent domain are strictly construed because the exercise of the power involves a compulsory taking of private property.[1] In the absence of clear language authorizing the taking of a greater interest, the interest which may be taken is a right to use the land for the public purpose specified,[2] and upon abandonment of this use the title of the original owner is unincumbered as before the condemnation.[3] The nature of the interest which may be condemned is a question for the legislature,[4] and a fee simple will pass to the person exercising the power if the statute so provides.[5] In such a case the original owner has no further interest in the land. He cannot

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[17] See N. Y. CODE CIV. PROC., § 507; Foot *v.* Sprague, 12 How. Pr. (N. Y.) 355.

[18] Pearce *v.* Olney, 20 Conn. 544.

[19] Christmas *v.* Russell, 5 Wall. (U. S.) 290; Mooney *v.* Hinds, 160 Mass. 469, 36 N. E. 484.

[20] Ward *v.* Quinlivin, 57 Mo. 425; Levin *v.* Gladstein, 142 N. C. 482, 55 S. E. 371.

[1] Washington Cemetery *v.* Prospect Park & Coney Island R. Co., 68 N. Y. 591. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 449.

[2] Washington Cemetery *v.* Prospect Park & Coney Island R. Co., *supra*; Attorney General *v.* Jamaica Pond Aqueduct Corporation, 133 Mass. 361. Ordinarily this right is called an easement. Proprietors of Locks and Canals on Merrimack River *v.* Nashua & Lowell R. Co., 104 Mass. 1. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 810. Where, as in the ordinary case, right to possession of the land is given, as where a railroad company condemns land for a right of way, some courts have held that this interest is not properly an easement, but is corporeal in its nature. Pennsylvania Schuylkill Valley R. *v.* Reading Paper Mills, 149 Pa. St. 18, 24 Atl. 205; Western Union Telegraph Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 Sup. Ct. 133. These courts agree, however, that the original owner can restrain an unauthorized use of the land and that the land reverts to the original owner on abandonment of the use for which it was taken. Lance's Appeal, 55 Pa. St. 16; Lazarus *v.* Morris, 212 Pa. St. 128, 61 Atl. 815.

[3] Chambers *v.* Great Northern Power Co., 100 Minn. 214, 110 N. W. 1128; McCombs *v.* Stewart, 40 Oh. St. 647.

[4] Fairchild *v.* City of St. Paul, 46 Minn. 540, 49 N. W. 325.

[5] Heyward *v.* Mayor, etc. of New York, 7 N. Y. 314. *Contra*, Kellog *v.* Malin, 50 Mo. 496.

complain if the land is put to a private use even though, as against the state, this use be wrongful,[6] and there is no right of reversion in him if the use for which the land was taken is abandoned.[7]

An interesting question arises when land condemned under a statute which gives only the right to use the land is afterwards put to a different public use from that for which it was condemned. In a recent Nebraska case the defendant's assignor condemned the right to flood the plaintiff's land for a grist mill. An electric-light plant was later substituted for the grist mill. The court refused to enjoin the flooding of the plaintiff's land for the electric-light plant, provided the defendant pay for such damage, if any, as was caused by the operation of the electric-light plant over and above the damage which would have been caused by running the grist mill. *Lucas* v. *Ashland Light Mill & Power Co.*, 138 N. W. 761 (Neb.). Certainly it seems a hardship if the defendant must pay over again for a new use which is no more burdensome than the old one. Such hardship seems to have had weight with the Ohio court in a similar case.[8] It is difficult, however, to escape the conclusion elsewhere reached, that by the substitution of a new use for the old one, the old use is abandoned and the land reverts free to the original owner.[9] It would follow that in a proceeding instituted subsequently the owner would be entitled to full compensation as for the use of unincumbered land.[10] If, however, before the old use is abandoned the legislature provides that land used for one public purpose be put to a different public use, the imposition of the new use effects relief from the burden of the old, and this should be taken into account in determining the compensation to be made for such imposition. Accordingly in such a case payment for the damage caused by the change in use would seem sufficient.[11] The same reasoning would apply where a new use is condemned under a general power of eminent domain before the old use is abandoned.

It is sometimes said that the legislature can authorize a change from one public use to another public use of a kindred nature without compensating the owner.[12] But the land cannot be subjected to additional

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[6] Currie *v.* New York Transit Co., 66 N. J. Eq. 313, 58 Atl. 308; Hamilton *v.* Annapolis & Elk Ridge R. Co., 1 Md. Ch. 107.

[7] Malone *v.* City of Toledo, 34 Oh. St. 541; Rexford *v.* Knight, 11 N. Y. 308.

[8] Hatch *v.* Cincinnati & Indiana R. Co., 18 Oh. St. 92.

[9] Pittsburg & Lake Erie R. Co. *v.* Bruce, 102 Pa. 23; Heard *v.* City of Brooklyn, 60 N. Y. 242.

[10] The decisions in Hatch *v.* Cincinnati & Indiana R. Co., *supra*, and the principal case cannot be supported on the ground that the subsequent use was in reality not a new use, for in such a case no damage at all should be awarded.

[11] Murray *v.* County Commissioners of Berkshire, 12 Met. (Mass.) 455. *Cf.* In the Matter of the Village of Olean *v.* Steyner, 135 N. Y. 341, 32 N. E. 9. In some jurisdictions compensation for the right taken is not allowed to be diminished by the benefits received from the imposition of the use. See 2 LEWIS, EMINENT DOMAIN, §§ 687–693. If in these jurisdictions the benefit conferred by the relief from the old use could not be deducted, it should at least be considered that the right taken is taken over land which is not unincumbered but which is at the time subject to the old use, in which case the damages would not usually be large. Tufts *v.* City of Charleston, 2 Gray (Mass.) 271.

[12] See Curran *v.* City of Louisville, 83 Ky. 628, 632, 633; Chase *v.* Sutton Manufacturing Co., 4 Cush. (Mass.) 152, 167, 168.

burden by the legislature without compensation,[13] and it is not perceived how it can be important that the new use is kindred to the old one if in fact it imposes a heavier burden. And if the new use imposes no greater burden on the land than the old one it would seem that compensation need not be made whether the new use be kindred to the old one or not.

REVISION OF ALIMONY DECREES. — Cases resulting in decrees for the payment of alimony form no exception to the general principle that what is once adjudicated is not to be retried.[1] Hence, in the absence of express reservation of the power to modify,[2] the decree conclusively determines the proper allowance under the then existing conditions and a revision can proceed, if at all, only on new facts.[3] Upon proper allegations of the changed circumstances of the parties, revision is ordinarily allowed in cases of divorce *a mensa et thoro* [4] and in cases where alimony is granted without divorce.[5] For in such cases the basis of the decree is merely the common-law right of the wife to support,[6] the pecuniary value of which must necessarily vary with the circumstances of the parties. In absolute divorce, however, the marriage relation is terminated and the property rights incidental to it are destroyed.[7] In such cases some courts have reasoned that the basis of the decree is not only the right to support, but also the loss of these property rights as to which the adjudication must be final,[8] unless there is a statute [9] expressly providing for a revision, or a reservation in the decree itself.[10] A few other jurisdictions reach the same result on the doctrine, which would seem to be untenable, that the general rule forbidding the alteration of decrees applies to decrees for alimony even where there has been a substantial change in the circum-

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[13] State *v.* Laverack, 34 N. J. L. 201.

[1] Petersine *v.* Thomas, 28 Oh. St. 596; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360. Of course, a decree for alimony, like other decrees, is subject to modification for fraud or mistake. Senter *v.* Senter, 70 Cal. 619, 11 Pac. 782; Gray *v.* Gray, 83 Mo. 106.

[2] In some states it is more or less the practice to make this reservation in the decree. See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875. Sometimes also the court orders a mere nominal alimony for the time being. See Lewsen *v.* Shotwell, 27 Miss. 630. These decrees, it has been urged, should not be construed as settling what the court intended they should not settle. See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875.

[3] Parker *v.* Parker, 61 Ill. 369; Blythe *v.* Blythe, 25 Ia. 266.

[4] Saunders *v.* Saunders, 1 Sw. & Tr. 72; Rogers *v.* Vines, 6 Ired. (N. C.) 293.

[5] Anonymous, 1 Desauss. Eq. (S. C.) 112; Beck *v.* Beck, 43 N. J. Eq. 668.

[6] Garland *v.* Garland, 50 Miss. 694; Trotter *v.* Trotter, 77 Ill. 510. Some courts, however, disregard this reason when they award alimony in marriages void *ab initio*. Strode *v.* Strode, 3 Bush (Ky.) 227. *Contra*, 34 W. Va. 524. In such cases there should be relief in tort. See 22 HARV. L. REV. 307.

[7] See Barrett *v.* Failing, 111 U. S. 523, 525, 4 Sup. Ct. 598. See 2 NELSON, MARRIAGE, DIVORCE, AND SEPARATION, § 903. *Cf.* 16 HARV. L. REV. 521.

[8] Petersine *v.* Thomas, *supra*. See 2 NELSON, MARRIAGE, DIVORCE, AND SEPARATION, §§ 903, 933 *a*.

[9] Such statutes exist in Ark., Colo., Ga., Ill., Ia., Ky., Me., Mass., Mich., Minn., Miss., Mo., Neb., N. H., S. D., Vt., Wis. In some states revision is denied under a statute. Kerr *v.* Kerr, 59 How. Pr. (N. Y.) 255; Park *v.* Park, 18 Hun (N. Y.) 466.

[10] There is an intimation that perhaps the terms of a decree of alimony may operate to *exclude* any future modification. See Hyde *v.* Hyde, 4 Sw. & Tr. 80, 81.